



(the “Merger Agreement”) with First Horizon, pursuant to which stockholders of Capital Bank will receive cash or stock equivalent to 1.750 Parent shares and \$7.90 in cash for each Capital Bank share they own.

3. On June 29, 2017, defendants filed a Form S-4 Registration Statement (the “Registration Statement”) with the United States Securities and Exchange Commission (“SEC”) in connection with the Proposed Transaction.

4. The Registration Statement omits material information with respect to the Proposed Transaction, which renders the Registration Statement false and misleading. Accordingly, plaintiff alleges herein that defendants violated Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (the “1934 Act”) in connection with the Registration Statement.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the claims asserted herein pursuant to Section 27 of the 1934 Act because the claims asserted herein arise under Sections 14(a) and 20(a) of the 1934 Act and Rule 14a-9.

6. This Court has jurisdiction over defendants because each defendant is either a corporation that conducts business in and maintains operations within this District, or is an individual with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

7. Venue is proper under 28 U.S.C. § 1391(b) because a substantial portion of the transactions and wrongs complained of herein occurred in this District.

#### **PARTIES**

8. Plaintiff is, and has been continuously throughout all times relevant hereto, the owner of Capital Bank common stock.

9. Defendant Capital Bank is a Delaware corporation and maintains its principal executive offices at 4725 Piedmont Row Drive, Suite 110, Charlotte, North Carolina 28210. Capital Bank's common stock is traded on the NasdaqGS under the ticker symbol "CBF."

10. Defendant R. Eugene Taylor ("Taylor") has served as a director, Chairman of the Board, and Chief Executive Officer ("CEO") of Capital Bank since 2009. According to the Company's website, Taylor is a member of the Risk Committee.

11. Defendant Martha M. Bachman ("Bachman") has served as a director of Capital Bank since October 2012. According to the Company's website, Bachman is a member of the Risk Committee.

12. Defendant Richard M. DeMartini ("DeMartini") has served as a director of Capital Bank since 2009. According to the Company's website, DeMartini is a member of the Nominating and Governance Committee and the Compensation Committee.

13. Defendant Peter N. Foss ("Foss") has served as a director of Capital Bank since 2009. According to the Company's website, Foss is Chair of the Audit Committee, Chair of the Nominating and Governance Committee, and a member of the Compensation Committee.

14. Defendant William A. Hodges ("Hodges") has served as a director of Capital Bank since 2009. According to the Company's website, Hodges is Chair of the Risk Committee and member of the Audit Committee, the Nominating and Governance Committee, and the Compensation Committee.

15. Defendant Scott B. Kauffman ("Kauffman") has served as a director of Capital Bank since October 2016. According to the Company's website, Kauffman is a member of the Audit Committee.

16. Defendant Oscar A. Keller III (“Keller”) has served as a director of Capital Bank since October 2012. According to the Company’s website, Keller is a member of the Audit Committee and the Risk Committee.

17. Defendant Marc D. Oken (“Oken”) is a director of Capital Bank. According to the Company’s website, Oken is Chair of the Compensation Committee and a member of the Audit Committee and the Nominating and Governance Committee.

18. Defendant Robert L. Reid (“Reid”) has served as a director of Capital Bank since October 2016. According to the Company’s website, Reid is a member of the Risk Committee.

19. Defendant William G. Ward Sr. (“Ward”) has served as a director of Capital Bank since October 2012. According to the Company’s website, Ward is a member of the Audit Committee.

20. The Defendants identified in paragraphs 9 through 19 are collectively referred to herein as the “Individual Defendants.”

21. Defendant Parent is a Tennessee corporation and a party to the Merger Agreement.

22. Defendant Merger Sub is a Delaware corporation, a wholly-owned subsidiary of Parent, and a party to the Merger Agreement.

### **CLASS ACTION ALLEGATIONS**

23. Plaintiff brings this action as a class action on behalf of himself and the other public stockholders of Capital Bank (the “Class”). Excluded from the Class are defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant.

24. This action is properly maintainable as a class action.

25. The Class is so numerous that joinder of all members is impracticable. As of April 30, 2017, there were approximately 35,213,068 shares of Capital Bank Class A common stock outstanding, held by hundreds, if not thousands, of individuals and entities scattered throughout the country.

26. Questions of law and fact are common to the Class, including, among others: (i) whether defendants violated the 1934 Act; and (ii) whether defendants will irreparably harm plaintiff and the other members of the Class if defendants' conduct complained of herein continues.

27. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class and plaintiff has the same interests as the other members of the Class. Accordingly, plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

28. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct for defendants, or adjudications that would, as a practical matter, be dispositive of the interests of individual members of the Class who are not parties to the adjudications or would substantially impair or impede those non-party Class members' ability to protect their interests.

29. Defendants have acted, or refused to act, on grounds generally applicable to the Class as a whole, and are causing injury to the entire Class. Therefore, injunctive relief on behalf of the Class is appropriate.

## SUBSTANTIVE ALLEGATIONS

### *Background of the Company and the Proposed Transaction*

30. Capital Bank is a bank holding company that was formed in 2009 to create a premier regional banking franchise in the southeast.

31. The Company is the parent company of Capital Bank Corp., a North Carolina-chartered financial institution with \$10.1 billion in assets and 193 full-service banking offices in Florida, North and South Carolina, and Tennessee.

32. On January 26, 2017, Capital Bank issued a press release wherein it reported its results for the fourth quarter of 2016. Among other things, core net income rose 22% to \$22.3 million, or \$0.44 per diluted share. The Company reported the closing of its acquisition of CommunityOne on October 26, 2016, and achieving CommunityOne cost savings of 35%. Additionally, during the quarter, the Company rolled out a new payments platform, including new debit card, credit card, and merchant service offerings.

33. With respect to the results, Individual Defendant Taylor commented:

Capital Bank ended 2016 with very strong results, thanks to the productivity of our teammates, the trust extended us by our clients, and the confidence of our investors. We believe the bank is very well positioned for 2017 in all of our geographies, and we're especially pleased to have our new teammates from CommunityOne now contributing to the bank's growth and profitability.

34. Chris Marshall, Chief Financial Officer of Capital Bank, further commented: "We closed the CommunityOne merger with financial metrics that are slightly better than the original estimates, and we're on track for a smooth systems conversion next month. We are extremely well positioned for consistent improvements in efficiency and profitability throughout 2017."

35. Nevertheless, the Board caused the Company to enter into the Merger Agreement, pursuant to which Capital Bank will be acquired for inadequate consideration.

36. The Individual Defendants have all but ensured that another entity will not emerge with a competing proposal by agreeing to a “no solicitation” provision in the Merger Agreement that prohibits the Individual Defendants from soliciting alternative proposals and severely constrains their ability to communicate and negotiate with potential buyers who wish to submit or have submitted unsolicited alternative proposals.

37. Further, the Company must promptly advise First Horizon of any proposals or inquiries received from other parties.

38. Moreover, the Merger Agreement contains a highly restrictive “fiduciary out” provision permitting the Board to change its recommendation of the Proposed Transaction under extremely limited circumstances, and grants First Horizon a “matching right” with respect to any superior “Acquisition Proposal” made to the Company.

39. Further locking up control of the Company in favor of First Horizon, the Merger Agreement provides for a “termination fee” of \$85 million payable by the Company to First Horizon if the Individual Defendants cause the Company to terminate the Merger Agreement.

40. By agreeing to all of the deal protection devices, the Individual Defendants have locked up the Proposed Transaction and have precluded other bidders from making successful competing offers for the Company.

41. The consideration to be provided to plaintiff and the Class in the Proposed Transaction is inadequate.

42. Among other things, the intrinsic value of the Company is materially in excess of the amount offered in the Proposed Transaction.

43. The merger consideration further fails to adequately compensate the Company's stockholders for the significant synergies that will result from the merger.

44. Accordingly, the Proposed Transaction will deny Class members their right to share proportionately and equitably in the true value of the Company's valuable and profitable business, and future growth in profits and earnings.

***The Registration Statement Omits Material Information, Rendering It False and Misleading***

45. Defendants filed the Registration Statement with the SEC in connection with the Proposed Transaction.

46. The Registration Statement omits material information with respect to the Proposed Transaction, which renders the Registration Statement false and misleading.

47. First, the Registration Statement omits material information regarding the financial projections of Capital Bank, First Horizon, and the pro forma combined company, as well as the financial analyses performed by the Company's financial advisor, Sandler O'Neill & Partners, L.P. ("Sandler O'Neill").

48. Specifically, in performing its valuation analyses, Sandler O'Neill reviewed and used "earnings per share estimates for Capital Bank Financial for the years ending December 31, 2017 and December 31, 2018, and estimated long-term annual earnings per share growth rate and dividend assumptions for Capital Bank Financial, as provided by the senior management of Capital Bank Financial." The Registration Statement, however, fails to disclose those projections of earnings per share for Capital Bank for the years ending December 31, 2017 and December 31, 2018, and the long-term annual earnings per share growth rate and dividend assumptions for Capital Bank.



49. Similarly, the Registration Statement indicates that Sandler O’Neill reviewed and used “earnings per share estimates for First Horizon for the years ending December 31, 2017 and December 31, 2018, as provided by the senior management of First Horizon, and a publicly available mean analyst estimated long-term annual earnings per share growth rate for First Horizon, as directed by the senior management of Capital Bank Financial.” The Registration Statement, however, fails to disclose those projections of earnings per share for First Horizon for the years ending December 31, 2017 and December 31, 2018, and the long-term annual earnings per share growth rate for First Horizon.

50. Additionally, according to the Registration Statement, in performing its valuation analyses, Sandler O’Neill reviewed and used the “pro forma financial impact of the merger on First Horizon based on certain assumptions relating to purchase accounting adjustments, cost savings and transaction expenses, as provided by the senior management of First Horizon.” The Registration Statement, however, fails to disclose the assumptions relating to purchase accounting adjustments, cost savings, and transaction expenses used by Sandler O’Neill in its analyses.

51. The Registration Statement also fails to disclose the “First Horizon Estimates,” the “First Horizon Capital Bank Financial Projections,” and “Pro Forma Estimates” reviewed and used by First Horizon’s financial advisor, Barclays Capital Inc. in its valuation analysis, as well as the “Estimates for Capital Bank Financial” and the “Estimates for First Horizon” reviewed and used by First Horizon’s other financial advisor, Morgan Stanley & Co., LLC in its valuation analysis.

52. With respect to Sandler O’Neill’s *Net Present Value Analysis* for Capital Bank, the Registration Statement fails to disclose: (i) the earnings estimates for Capital Bank for the

years ending December 31, 2017 and December 31, 2018; (ii) the estimated long-term annual earnings per share growth rate and dividend assumptions for the Company as provided by Company senior management; (iii) the 2021 earnings and December 31, 2021 tangible book value estimates used to derive the Company's terminal value; (iv) the terminal value of the Company; (v) the inputs and assumptions underlying the discount rates ranging from 8.0% to 13.0%; and (vi) the perpetuity growth rate range implied from the selected terminal multiples.

53. With respect to Sandler O'Neill's *Net Present Value Analysis* for First Horizon, the Registration Statement fails to disclose: (i) the earnings per share estimates for First Horizon for the years ending December 31, 2017 and December 31, 2018; (ii) the estimated long-term annual earnings per share growth rate for First Horizon; (iii) the 2021 earnings and December 31, 2021 tangible book value estimates used to derive First Horizon's terminal value; (iv) the terminal value of First Horizon; (v) the inputs and assumptions underlying the discount rates ranging from 8.0% to 13.0%; (vi) the perpetuity growth rate range implied from the selected terminal multiples.

54. With respect to Sandler O'Neill's *Pro Forma Merger Analysis*, the Registration Statement fails to disclose: (i) the earnings per share estimates for Capital Bank for the years ending December 31, 2017 and December 31, 2018; (ii) the estimated long-term annual earnings per share growth rate and dividend assumptions for the Company as provided by Company senior management; (iii) the earnings per share estimates for First Horizon for the years ending December 31, 2017 and December 31, 2018 as provided by First Horizon senior management; (iv) the estimated long-term annual earnings per share growth rate for First Horizon; (v) the assumptions relating to the purchase accounting adjustments, cost savings, and transaction expenses; and (vi) the specific accretion and dilution figures resulting from this analysis to EPS

and tangible book value for the years ending December 31, 2018 through 2020.

55. With respect to Sandler O'Neill's *Comparable Company Analyses*, the Registration Statement fails to disclose the individual multiples and financial benchmarking metrics for the companies observed by Sandler O'Neill in the analysis.

56. With respect to Sandler O'Neill's *Analysis of Selected Merger Transactions*, the Registration Statement fails to disclose the individual multiples and financial metrics for the transactions observed by Sandler O'Neill in the analysis.

57. When a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed. Moreover, the disclosure of projected financial information is material because it provides stockholders with a basis to project the future financial performance of a company, and allows stockholders to better understand the financial analyses performed by the company's financial advisor in support of its fairness opinion.

58. The omission of this material information renders the Registration Statement false and misleading, including, *inter alia*, the following sections of the Registration Statement: (i) "Background of the Merger"; (ii) "Capital Bank Financial's Reasons for the Merger; Recommendation of the Capital Bank Financial Board of Directors"; and (iii) "Opinion of Capital Bank Financial's Financial Advisor."

59. Second, the Registration Statement omits material information regarding potential conflicts of interest of the Company's officers and directors.

60. The Registration Statement fails to disclose the timing and nature of all communications regarding future employment and directorship of Capital Bank's officers and

directors, including who participated in all such communications, including the communications and negotiations with respect to Individual Defendant Taylor's new employment agreement with First Horizon and Individual Defendants Taylor's and Foss's future role as directors of First Horizon.

61. Communications regarding post-transaction employment during the negotiation of the underlying transaction must be disclosed to stockholders. This information is necessary for stockholders to understand potential conflicts of interest of management and the Board, as that information provides illumination concerning motivations that would prevent fiduciaries from acting solely in the best interests of the Company's stockholders.

62. The omission of this material information renders the Registration Statement false and misleading, including, *inter alia*, the following sections of the Registration Statement: (i) "Background of the Merger"; (ii) "Capital Bank Financial's Reasons for the Merger; Recommendation of the Capital Bank Financial Board of Directors"; and (iii) "Interests of Capital Bank Financial's Directors and Executive Officers in the Merger."

63. Third, the Registration Statement omits material information regarding UBS Securities LLC ("UBS"), Capital Bank's second financial advisor in connection with the Proposed Transaction.

64. Specifically, the Registration Statement fails to disclose any information regarding UBS's engagement, including: (i) the scope of UBS's engagement, including whether UBS was engaged or requested to deliver a fairness opinion to the Company; (ii) the fee to be received by UBS, as well as the structure of the fee payment, including the percentage of the fee that is contingent upon consummation of the Proposed Transaction, if any; and (iii) the services UBS has provided to Capital Bank, First Horizon, and/or their affiliates in the past three years,

and the amount of compensation received for such services.

65. The Registration Statement further fails to disclose Sandler O'Neill's and UBS's respective holdings in Capital Bank's, First Horizon's, and their affiliates' stock.

66. Full disclosure of investment banker compensation and all potential conflicts is required due to the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives.

67. The omission of this material information renders the Registration Statement false and misleading, including, *inter alia*, the following sections of the Registration Statement: (i) "Background of the Merger"; (ii) "Capital Bank Financial's Reasons for the Merger; Recommendation of the Capital Bank Financial Board of Directors"; and (iii) "Opinion of Capital Bank Financial's Financial Advisor."

68. Fourth, the Registration Statement fails to disclose whether any non-disclosure agreements executed by Capital Bank and the five prospective bidders (including First Horizon) contained standstill and/or "don't ask, don't waive" provisions that are or were preventing those counterparties from submitting superior offers to acquire the Company.

69. If the confidentiality agreements do contain such provisions, stockholders may have the mistaken belief that, if these potentially interested parties wished to come forward with a superior offer, they are or were permitted to do so, when in fact they are or were contractually prohibited from doing so.

70. The omission of this material information renders the Registration Statement false and misleading, including, *inter alia*, the following sections of the Registration Statement: (i) "Background of the Merger"; and (ii) "Capital Bank Financial's Reasons for the Merger; Recommendation of the Capital Bank Financial Board of Directors."

71. The above-referenced omitted information, if disclosed, would significantly alter the total mix of information available to Capital Bank's stockholders.

### COUNT I

#### **Claim for Violation of Section 14(a) of the 1934 Act and Rule 14a-9 Promulgated Thereunder Against the Individual Defendants and Capital Bank**

72. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

73. The Individual Defendants disseminated the false and misleading Registration Statement, which contained statements that, in violation of Section 14(a) of the 1934 Act and Rule 14a-9, in light of the circumstances under which they were made, omitted to state material facts necessary to make the statements therein not materially false or misleading. Capital Bank is liable as the issuer of these statements.

74. The Registration Statement was prepared, reviewed, and/or disseminated by the Individual Defendants. By virtue of their positions within the Company, the Individual Defendants were aware of this information and their duty to disclose this information in the Registration Statement.

75. The Individual Defendants were at least negligent in filing the Registration Statement with these materially false and misleading statements.

76. The omissions and false and misleading statements in the Registration Statement are material in that a reasonable stockholder will consider them important in deciding how to vote on the Proposed Transaction. In addition, a reasonable investor will view a full and accurate disclosure as significantly altering the total mix of information made available in the Registration Statement and in other information reasonably available to stockholders.

77. The Registration Statement is an essential link in causing plaintiff and the Company's stockholders to approve the Proposed Transaction.

78. By reason of the foregoing, defendants violated Section 14(a) of the 1934 Act and Rule 14a-9 promulgated thereunder.

79. Because of the false and misleading statements in the Registration Statement, plaintiff and the Class are threatened with irreparable harm.

## **COUNT II**

### **Claim for Violation of Section 20(a) of the 1934 Act Against the Individual Defendants and First Horizon**

80. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

81. The Individual Defendants and First Horizon acted as controlling persons of Capital Bank within the meaning of Section 20(a) of the 1934 Act as alleged herein. By virtue of their positions as officers and/or directors of Capital Bank and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Registration Statement, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that plaintiff contends are false and misleading.

82. Each of the Individual Defendants and First Horizon was provided with or had unlimited access to copies of the Registration Statement alleged by plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause them to be corrected.

83. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control and influence the particular transactions giving rise to the violations as alleged herein, and exercised the same. The Registration Statement contains the unanimous recommendation of the Individual Defendants to approve the Proposed Transaction. They were

thus directly in the making of the Registration Statement.

84. First Horizon also had direct supervisory control over the composition of the Registration Statement and the information disclosed therein, as well as the information that was omitted and/or misrepresented in the Registration Statement.

85. By virtue of the foregoing, the Individual Defendants and First Horizon violated Section 20(a) of the 1934 Act.

86. As set forth above, the Individual Defendants and First Horizon had the ability to exercise control over and did control a person or persons who have each violated Section 14(a) of the 1934 Act and Rule 14a-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the 1934 Act. As a direct and proximate result of defendants' conduct, plaintiff and the Class are threatened with irreparable harm.

### **PRAYER FOR RELIEF**

**WHEREFORE**, plaintiff prays for judgment and relief as follows:

- A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;
- B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages;
- C. Directing the Individual Defendants to disseminate a Registration Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;
- D. Declaring that defendants violated Sections 14(a) and/or 20(a) of the 1934 Act, as well as Rule 14a-9 promulgated thereunder;



E. Awarding plaintiff the costs of this action, including reasonable allowance for plaintiff's attorneys' and experts' fees; and

F. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff respectfully requests a trial by jury on all issues so triable.

Dated: July 19, 2017

**WARD BLACK LAW**

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## CERTIFICATION OF PLAINTIFF

I, PAUL PARSHALL (“Plaintiff”), hereby declare as to the claims asserted under the federal securities laws that:

1. Plaintiff has reviewed the complaint and authorizes its filing.
2. Plaintiff did not purchase the security that is the subject of this action at the direction of Plaintiff’s counsel or in order to participate in any private action.
3. Plaintiff is willing to serve as a representative party on behalf of the class, either individually or as part of a group, and I will testify at deposition or trial, if necessary. I understand that this is not a claim form and that I do not need to execute this Certification to share in any recovery as a member of the class.
4. Plaintiff’s purchase and sale transactions in the Capital Bank Financial Corp. (NasdaqGS: CBF) security that is the subject of this action during the class period is/are as follows:

### PURCHASES

Buy Date	Shares	Price per Share
12/19/16	112	\$38.00

### SALES

Sell Date	Shares	Price per Share

*Please list additional transactions on separate sheet of paper, if necessary.*

5. Plaintiff has complete authority to bring a suit to recover for investment losses on behalf of purchasers of the subject securities described herein (including Plaintiff, any co-owners, any corporations or other entities, and/or any beneficial owners).

6. During the three years prior to the date of this Certification, Plaintiff has not moved to serve as a representative party for a class in an action filed under the federal securities laws.

7. Plaintiff will not accept any payment for serving as a representative party on behalf of the class beyond Plaintiff's *pro rata* share of any recovery, except such reasonable costs and expenses (including lost wages) directly relating to the representation of the class as ordered or approved by the Court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30 day of July, 2017.

  
PAUL PARSHALL

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Stockholder Sues Capital Bank, First Horizon Over Proposed Merger](#)

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